

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

EDWARD SHAWN KISOR

Claimant

VS.

EXIDE TECHNOLOGIES

Self-Insured Respondent

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Docket No. 1,030,983

ORDER

Claimant appealed the November 7, 2006, preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

Claimant alleges he injured his left knee while working for respondent on August 21, 2006, when he stepped from a pedestal onto a thick electrical cord and twisted his left knee. But the Judge denied claimant's request for benefits after finding claimant had failed to prove he injured his knee at work. The Judge summarized his reasoning:

Claimant failed to report an accident until after he was suspended. Claimant failed to exhibit a limp until after he was suspended. Although present at the nurse's station, he failed to report an injury, and failed to exhibit a limp. Although he testified that he was trying to just get to the weekend, he signed up to work overtime and expressed displeasure at being denied the opportunity to work that overtime. Claimant's supervisor walked with him down twenty stairs and across a distance of two hundred yards, without ever observing any sign of a limp. While claimant now exhibits objective signs of an injury, the evidence fails to establish that injury as work-related.¹

Claimant contends Judge Moore erred. Claimant argues he attempted to notify his lead man, Mike Cramer, within minutes of the accident on Monday, August 21, but there is no question that he told supervisor Jim Barta about the accident on Wednesday, August 23. Accordingly, claimant argues the two supervisors' testimony that they did not notice claimant limping before claimant provided notice on August 23 is of no consequence

¹ ALJ Order (Nov. 7, 2006).

and probably unreliable. Claimant also challenges that testimony on the basis those two supervisors would not have had an unobstructed view of claimant as he worked following the accident.

In addition, claimant argues the suspension he was given would not have motivated him to conjure up a claim for accident as the suspension was rescinded without him losing any days of work. Further, claimant explains he did not mention his knee injury to the plant nurse as he was trying to work through the pain until his days off. And it was not until Sunday, August 27, that he realized his knee would require more than rest. In summary, claimant contends the preliminary hearing Order should be reversed as he has proven it is more probably true than not that he tore the meniscus in his left knee at work on August 21, 2006, when he stepped down from a pedestal and rolled his ankle.

Conversely, respondent contends the preliminary hearing Order should be affirmed. Respondent asserts the Judge properly questioned claimant's credibility in light of the other testimony. Respondent points out that Mr. Cramer denied that claimant notified him of the accident on August 21 and that both Mr. Cramer and Mr. Barta denied seeing claimant limping as he continued to work following the accident. In short, respondent contends claimant is not credible and, therefore, he has failed to prove he injured his left knee working for respondent.

The only issue on this appeal is whether claimant has established he injured his left knee at work on August 21, 2006.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

As indicated above, claimant alleges he turned his left ankle and twisted his left knee at work at approximately 1:30 p.m. on August 21, 2006, when he stepped down from a pedestal onto a thick electrical cord. Claimant testified that within minutes of the accident he shouted to his lead man Mike Cramer, who had come to claimant's work area to fix a piece of equipment described as an auto dropper, that he had twisted his left knee. According to claimant, Mr. Cramer shrugged his shoulders, lifted his hands into the air, dropped his hands and went to work on the auto dropper.

But Mr. Cramer denies that occurred. Moreover, Mr. Cramer testified he did not perform any work or work on any machinery on claimant's line on August 21. Mr. Cramer also testified he saw claimant walking on August 21 but did not see him limp. And he also saw claimant walking a couple of times on August 22 but did not notice him having any problems. Another of claimant's supervisors, Jim Barta, testified he did not see claimant

limping until Wednesday afternoon, August 23, after claimant was advised he was being suspended.

Furthermore, Janene Cumberland, a human resources assistant employed by respondent, observed claimant walking on August 23, 2006, and did not notice him limping.

Claimant sought medical treatment on August 27, 2006, when he saw Dr. John Shetlar at StatCare. The document from that visit does not address whether claimant was limping. But it does indicate claimant reported that he twisted his knee when he stepped onto an electric cord and it rolled. Dr. Shetlar diagnosed left knee strain and restricted claimant from working until he was evaluated by the company physician.

On September 5, 2006, claimant saw Dr. David C. Hanson. Claimant again provided a history that he injured his left knee by stepping on an electrical cord. Moreover, claimant also reported he had experienced persistent discomfort since reporting the injury on August 21, 2006, and that moving his knee in a certain manner caused “real severe pain.”² In addition, claimant also noted that he experienced increased swelling the longer he was up on his feet.

Dr. Hanson ordered an MRI, which was performed on September 11, 2006. The MRI indicated claimant had a prominent bone marrow contusion on the tibia, increased fluid in the knee joint, possible meniscal tear and partial tear or strain of the lateral collateral ligament.

The medical notes from September 12, 2006, indicate claimant walked with a definite limp. But the medical notes from visits on September 5 and 16, 2006, do not address claimant’s gait.

At his attorney’s request, claimant saw Dr. Edward J. Prostic on October 20, 2006. Claimant again provided a history of twisting his left knee at work after stepping upon an electrical cord. Moreover, claimant advised the doctor his pain was almost constant but it would worsen with progressive standing or walking, going up or down stairs, or attempting to squat or kneel.

As there were no witnesses to the alleged accident, claimant’s credibility is crucial. Respondent argues claimant should not be believed for several reasons, among others: (1) Mr. Cramer, contrary to claimant’s testimony, denies claimant notified him of the knee injury on August 21; (2) contrary to claimant’s testimony, three witnesses (one by affidavit) indicated he did not have a noticeable limp shortly after the alleged accident; (3) claimant

² P.H. Trans., Cl. Ex. 1.

failed to mention his injury to the plant nurse when he had blood tests on August 22; and (4) claimant only reported the injury after he was suspended from work.

Mr. Cramer and Mr. Barta's specific memories of August 21 and 22 are incredible. On the other hand, Mr. Barta's testimony is believable that claimant did not demonstrate a limp while he was being escorted to the showers before being escorted from the plant. And that is directly contrary to claimant's testimony that he had a pronounced limp following the alleged August 21 accident.³ Arguably, such a discrepancy only indicates that claimant exaggerated the severity of his limp. But other circumstances caused the Judge to question claimant's credibility such as, among others, claimant's failure to mention his left knee injury to the plant nurse despite the fact he was allegedly experiencing significant left knee pain and swelling and claimant's failure to report the incident to Mr. Barta until he believed he was going to be suspended for three days and experience a loss of income. All in all, Judge Moore was not persuaded claimant injured his left knee in the manner alleged.

Judge Moore had the opportunity to observe claimant and his two supervisors testify and the Judge was, therefore, able to assess their demeanor and credibility. The undersigned views the evidence somewhat differently than Judge Moore. For example, the undersigned does not disbelieve claimant for failing to immediately report his alleged knee injury to the plant nurse. Likewise, claimant is not to be disbelieved because he had signed up to work overtime the week of his alleged accident as the record does not indicate if he signed up before or after his alleged injury. Nonetheless, the record does raise certain questions and considering the Judge's assessment of the witnesses' credibility the undersigned, who believes this is a very close case, is not persuaded at this juncture that claimant has satisfied his burden of proof. Accordingly, the preliminary hearing Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2005 Supp. 44-551(b)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

WHEREFORE, the undersigned Board Member affirms the November 7, 2006, preliminary hearing Order.

³ P.H. Trans. at 30.

⁴ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of February, 2007.

BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Anton C. Andersen, Attorney for Respondent
Bruce E. Moore, Administrative Law Judge